EX. 21
APP. 148

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LEXSEE 2006 U.S. DIST. LEXIS 208

ROBERT ROSS et al., Plaintiffs, -against- BANK OF AMERICA, N.A. (USA) et al., Defendants.

05 Civ. 7116 (WHP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2006 U.S. Dist. LEXIS 208

January 6, 2006, Decided

COUNSEL: [*1] Merrill G. Davidoff, Esq., Berger & Montague, P.C., Philadelphia, PA, On Behalf of All Plaintiffs.

Peter E. Greene, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, On Behalf of All Defendants.

JUDGES: WILLIAM H. PAULEY III, U.S.D.J.

OPINION BY: WILLIAM H. PAULEY III

OPINION:

ORDER

WILLIAM H. PAULEY III, District Judge:

By letter application, dated November 4, 2005, Defendants seek a stay of discovery pending the resolution of their motion to stay claims in favor of arbitration pursuant to *9 U.S.C. § 3* and their motion to dismiss pursuant to *Rules 12(b)(1)* and *12(b)(6)* of the Federal Rules of Civil Procedure. Plaintiffs oppose that application.

In view of the threshold issues concerning arbitration, this Court concludes that a stay of discovery is appropriate. See, e.g., *Intertec Contracting A/S v. Turner Steiner Int'l, S.A., 2001 U.S. Dist. LEXIS 9950, No. 98 Civ. 9116 (CSH), 2001 WL 812224, at *7 (S.D.N.Y. July 18, 2001)*; *Brockmeyer v. May, 1999 U.S. Dist. LEXIS 4372, No. 98 Civ. 5521 (DLC), 1999 WL 191547, at *2 (S.D.N.Y. Apr. 6, 1999)*.

Accordingly, for the reasons stated on the record on January 4, 2006, Defendants' application [*2] for a limited stay of discovery pending the resolution of their motion to stay this proceeding in favor of arbitration is granted.

Dated: January 6, 2006

New York, New York

SO ORDERED:

/s/

WILLIAM H. PAULEY III

U.S.D.J.

EX. 22
APP. 149 - 157

LEXSEE 2001 U.S. DIST. LEXIS 9950

INTERTEC CONTRACTING A/S INTERTEC (GIBRALTARA) LTD., and INTERTEC OVERSEAS LIMITED, Plaintiffs, -against- TURNER STEINER INTERNATIONAL, S.A.; TURNER STEINER EAST ASIA LIMITED; AND THE TURNER CORPORATION, Defendants.

98 Civ. 9116 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 9950

July 17, 2001, Decided
July 18, 2001, Filed

DISPOSITION: [*1] Plaintiffs' request for costs and expenses including attorney's fees as result of Turner's removal of this case denied. Plaintiffs' request for costs and expenses including attorney's fees incurred as result of delayed exchange of Turner project documents granted.

COUNSEL: For INTERTEC CONTRACTING A/S, plaintiff: Edward Kevin Lenci, Oppenheimer Wolff et ano., New York, NY.

For INTERTEC CONTRACTING A/S, INTERTEC (GIBRALTAR) LTD., INTERTEC OVERSEAS LIMITED, plaintiffs: P. Jay Wilker, Oppenheimer, Wolff & Donnelly, L.L.P., New York, NY.

For INTERTEC (GIBRALTAR) LTD., INTERTEC OVERSEAS LIMITED, plaintiffs: Barry M. Benjamin, Oppenheimer, Wolff & Donnelly, L.L.P., New York, NY.

For TURNER STEINER INTERNATIONAL, S.A., TURNER STEINER EAST ASIA LIMITED, THE TURNER CORPORATION, defendants: Roger S. Markowitz, Peckar & Abramson, P.C., New York, NY.

For TURNER STEINER EAST ASIA LIMITED, THE TURNER CORPORATION, defendants: Edward Kevin Lenci, Oppenheimer Wolff et ano., New York, NY.

JUDGES: CHARLES S. HAIGHT, JR., SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: CHARLES S. HAIGHT, JR.

OPINION:

MEMORANDUM OPINION AND ORDER

HAIGHT, Senior District Judge:

This case is before the Court on motions by the plaintiffs (1) for an order remanding the case to the state court for trial on the merits, and (2) for an award of costs and expenses, including attorney's fees, incurred as the result of (a) the defendants' removal of the case to this Court and (b) the resolution of a discovery dispute during the time the litigation was pending here.

Both parties agree that a remand to the Supreme Court of the State of New York, New York County, is now required. Part III of this Opinion will include an Order to the Clerk directing a remand. This Court retains jurisdiction for the sole purpose of adjudicating plaintiffs' second motion for costs and attorney's fees, an issue which does not implicate in any way the trial on [*2] the merits of plaintiffs' claims against defendants, to be resolved in state court.

This Court's Order dated April 25, 2001, bifurcated the plaintiffs' claim for costs and expenses, including attorney's fees. The Court will first decide whether, under governing law, plaintiffs are entitled to any award. If that question is answered in the affirmative, the Court will then determine the amount.

I. BACKGROUND

The factual background of this case was discussed at length in a prior opinion of this Court, familiarity with which is assumed. *Intertec Contracting A/S, et al. v. Turner Steiner International, S.A., et al., 2000 U.S. Dist. LEXIS 7413, 98 Civ. 9116, 2000 WL 709004* (S.D.N.Y.

May 31, 2000). The following recitation of the relevant facts, and subsequent developments, will suffice for purposes of deciding this motion.

This case originated in a commercial contract to construct office towers in Colombo, Sri Lanka. The developer, Overseas Realty (Ceylon) Ltd. ("ORCL"), entered into a contract with the above-captioned defendants (collectively referred to as "Turner"), providing, in part, that Turner would supply labor, materials and services to construct the towers. This contract is referred [*3] to as the "General Contract."

Turner then subcontracted to the plaintiffs (collectively referred to as "Intertec") portions of the General Contract for construction of the towers. This contract is referred to as "the Subcontract."

After the project encountered difficulties, Intertec brought an action against Turner in New York State Supreme Court, New York County, claiming that Turner had not paid monies owed to Intertec under the terms of the Subcontract. Turner removed Intertec's action to this Court, citing as the basis for removal the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"). The Convention was enacted into domestic legislation by Chapter 2 of the Federal Arbitration Act ("FAA"), *9 U.S.C. § § 201 et. seq. 9 U.S.C. § 205* provides that "where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States...."

The basis for Turner's removal was its mistaken belief [*4] that Intertec was bound by the Subcontract to arbitrate its dispute with Turner since the Subcontract incorporated by reference an arbitration agreement found in the General Contract between ORCL and Turner.

This Court concluded that "Turner's sole factual predicate for its removal of Intertec's state court action, the existence of an arbitration agreement binding upon Intertec, is not well founded," and ruled for the plaintiff by denying the defendants' motion to compel arbitration. *Intertec Contracting A/S, 2000 WL 709004* at *12. While "ordinarily this would result in an order remanding the case to the state court," I deferred the question of remand to allow the defendants an opportunity to appeal the Court's denial of its petition to compel arbitration. Id.

Turner then appealed to the Second Circuit where this Court's ruling was affirmed. *Intertec Contracting A/S, et. al. v. Turner Steiner, 2001 U.S. App. LEXIS 4156, No. 00-7796, 2001 WL 266997* at *1 (2d Cir. 2001)(affirmed by Summary Order).

Intertec now asks the Court for an award of its costs and expenses, including attorney's fees, incurred as a result of the defendants' removal of the case to this Court.

While [*5] litigation on the Second Circuit appeal was continuing, a dispute broke out with respect to an exchange of documents between the parties. That dispute, over which this Court presided under the circumstances related *infra*, lasted from September until December of 2000. At the core of the dispute was an agreement by which Turner committed, *inter alia*, to turn over various documents, located at that time in Sri Lanka, to Intertec. These documents are referred to as the "Turner project documents." As discussed in greater detail *infra*, though it was originally believed by both parties that the documents would arrive months earlier, Intertec did not receive the documents until December of 2000, due to a series of delays in their production, each of which was promptly and vehemently brought to the Court's attention.

In addition to the costs incurred as a result of the removal, Intertec additionally seeks an award for its costs and expenses, including attorney's fees, incurred as a result of this delay in document production.

II. DISCUSSION

A. Removal

As noted, Turner based its removal of the action from state court on the Convention. The Convention permits removal [*6] to a federal district court of a state court action which "relates to an arbitration agreement or award falling under the Convention," *9 U.S.C. § 905.* The case at bar turned upon the question whether the pertinent contracts contained an arbitration agreement "falling under the Convention" between Intertec and Turner.

In its removal action, Turner argued that while the Subcontract did not contain a provision requiring Intertec to arbitrate any dispute with Turner, it believed that a provision in the Subcontract incorporated by reference an arbitration agreement found in the General Contract between Turner and ORCL, thereby binding Intertec to arbitrate with Turner its claims against Turner

Without reproducing here the analysis the Court made of Turner's claims, which can be found in the opinion reported at *2000 U.S. Dist. LEXIS 7413, 2000 WL 709004* at **2-12, the Court found Turner's logic unavailing. The arbitration provisions of the General Contract were not incorporated by reference in the Subcontract, as the pre-arbitration provisions in the General Contract were a condition precedent for the use of arbitration proceedings, and those provisions were clearly inapplicable [*7] to Intertec. As stated *supra*, this conclusion was affirmed by the Second Circuit.

Intertec now seeks costs and expenses, including attorney's fees, pursuant to *28 U.S.C. § 1447*(c), for the period of time between Turner's removal of the case and the present, § 1447(c) provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Turner argues, first, that § 1447(c) is inapplicable to this case, since it was removed under *9 U.S.C. § § 201 et. seq.*, rather than under the general removal provisions of *28 U.S.C. § 1441 et. seq.*, and alternatively, [*8] that even if § 1447(c) were applicable to this case, no award under that statute would be appropriate.

Turner's first argument, that *28 U.S.C. § 1447*(c) does not apply because the case was removed pursuant to *9 U.S.C. § 205*, is unconvincing. Turner argues that § 205 does not incorporate provisions of the general removal statute such as § 1447(c). Unfortunately for Turner, the Second Circuit has specifically held to the contrary.

In *LaFarge Coppee v. Venezolana De Cementos, S.A.C.A., 31 F.3d 70 (2d Cir. 1994)*; the court of appeals addressed the appealability of an order by the district court remanding to state court an action removed pursuant to *9 U.S.C. § 205*. The court decided that it lacked appellate jurisdiction to consider the remand ordered under *28 U.S.C. § 1447*(c), as it was unappealable under § 1447(d). n1 In considering a removal pursuant to § 205, the court held, "Section 205 expressly provides, with an exception not relevant to this case, that "the procedure for removal of causes otherwise provided by law shall apply....' This language renders applicable the [*9] removal provisions of *28 U.S.C. § 1447*(c), (d) (1988)." *Id. at 71*. As the LaFarge court made mention, other circuits have agreed with this interpretation. See *In re Ocean Marine Mutual Protection and Indemnity Ass'n, 3 F.3d 353, 355-56 (11th Cir. 1993)*; *In re Amoco Petroleum Additives Co., 964 F.2d 706, 712 (7th Cir. 1992)*. To this list I add the following subsequently decided cases: *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 623 (8th Cir. 1997)*, and *Severonickel v. Gaston Reymenants, 115 F.3d 265, 266 (4th Cir. 1997)*. While LaFarge considered the appealability provisions of the general removal statute, no principled reason exists for reaching a different conclusion with respect to the statute's provisions for costs and fees.

> n1 "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise...," except in circumstances not relevant here. *28 U.S.C. § 1447*(d).

[*10]

Turner cites no authority to the contrary. Instead, Turner relies solely on *Hill v. Citicorp, 804 F. Supp. 514 (S.D.N.Y. 1992)*, a case which is easily distinguished. In Hill, the court considered the applicability of the 30-day time period requirement of § 1446(b) to a case removed under *12 U.S.C. § 632*. Under § 1446(b) a 30-day time period exists within which removal petitions must be filed, but under § 632 removal of matters involving international banking can be removed "at any time before the trial thereof." The court determined, in an instance where the two statutes were in explicit disagreement on the time period rule, that § 1446(b) had not been "projected into the removal provisions of section 632." *Id. at 517*. Such reasoning is not analogous here. Not only was the court in Hill considering a statute altogether different from *9 U.S.C. § 205* (despite some similarities in the language of the laws), the court found a direct conflict between the time period requirements of § 632 and § 1446(b). There is no such contradiction in the language of § 205 and § 1447(c). More importantly, [*11] Hill was decided prior to the Second Circuit holding in LaFarge that the general removal provisions apply to removals under § 205. It is the latter decision which binds this Court, and I follow its clear holding.

Turner's next argument is that *28 U.S.C. § 1447*(c) is inapplicable because this Court did not lack subject matter jurisdiction over this case, and it was not remanded for procedural defect.

Though the language of § 1447(c) does not clearly restrict the bases upon which a remand might allow for the non-removing party to recover costs and expenses, including attorney's fees, the statute refers explicitly to "defect[s]" in the removal and lack of "subject matter jurisdiction" as possible bases for removal under subsection (c), dealing with costs and expenses. At least one court in this circuit has held that such language "allows a court discretion to grant costs and fees in two circumstances: where subject matter is lacking and where there is a defect in the removal." *In re Lawrence, 233 B.R. 248, 253 (N.D.N.Y. 1999), citing LaMotte v. Roundy's Inc., 27 F.3d 314, 316 (7th Cir. 1994).* Without deciding whether [*12] other bases might be appropriate under § 1447(c) for a recovery of costs and expenses, the Court believes it is beyond doubt that the case at bar must be remanded for lack of subject matter jurisdiction.

In arguing that the Court has maintained a general subject matter jurisdiction in this case, Turner loses sight of the fact that the Court exercised a limited subject matter jurisdiction under *9 U.S.C. § 205* for the sole purpose of deciding whether an arbitration provision bound Intertec so that the Court could further exercise its subject matter jurisdiction to compel arbitration. In other words, the Court had subject matter jurisdiction to decide whether it had subject matter jurisdiction. In deciding that no such arbitration provision applied to Intertec, the Court concluded that it did not have subject matter jurisdiction in the general sense under § 205, because the necessary condition precedent for the exercise of such jurisdiction, an "arbitration agreement" falling under the Convention, did not exist. As provided for in the statute itself "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the [*13] case shall be remanded." § 1447(c). I decided the court lacked subject matter jurisdiction, and would have remanded the case at that time but for my intent to allow Turner to file an appeal.

The cases support this analysis. In Transit Casualty Co., the plaintiff filed an action in Missouri state court against certain underwriters at Lloyd's of London for alleged failure to pay reinsurance recoveries and interference with its liquidation. Lloyd's removed the case to federal district court pursuant to *9 U.S.C. § 205*. Transit by that time in receivership, the receivership filed a motion to remand, which the Court granted. The district court held that the Convention did not apply because the contract at issue was "precluded" by state law and because a "service-of-suit clause waived the underwriters' right to remove." *119 F.3d at 622.* Seeking review of the remand order, Lloyd's urged that the district court did not find that it lacked subject matter jurisdiction (as that would foreclose review by the court of appeals under § 1447(d)) in making its decision. The circuit court disagreed, holding "we disagree with the underwriters' characterization [*14] of the district court's remand order and interpret the order as holding that it lacked subject matter jurisdiction and remanding on that basis." *Id. at 623.* In language equally applicable to the case at bar, the court found that "[because] the parties' reinsurance agreements must fall under the Convention in order for the underwriters to remove under *9 U.S.C. § 205,* the district court's finding that the Convention does not apply to this cause of action resulted in a lack of removal jurisdiction and necessitated remand." *Id. at 623-24.*

The Second Circuit recently articulated this principle in *Smith/Enron Cogeneration Ltd. v. Smith Cogeneration Int'l, 198 F.3d 88 (2d Cir. 1999).* The petitioners there removed the case pursuant to the Convention, seeking to compel the respondents to arbitrate a contract dispute. In that case, as in the case at bar, Chapter 2 of the FAA provided the "only basis for federal jurisdiction." *Id. at 92.* The district court in Smith/Enron proceeded in the same fashion as I did. "In considering whether 'a particular dispute is arbitrable,' a court must first decide [*15] 'whether the parties agreed to arbitrate'." *Id. at 95, citing Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., 189 F.3d 289, 294 (2d Cir. 1999).* n2

n2 Unlike the case at bar, the court in Smith/Enron found that the Convention *did* apply to the dispute.

Having examined the two bases offered by Turner for finding § 1447(c) inapplicable to this matter, I find both of them unconvincing.

The Court must now determine whether Intertec has made a showing sufficient to justify the imposition of costs and expenses, including attorney's fees, upon Turner pursuant to § 1447(c). The Court determines that it has not.

28 U.S.C. § 1447(c) provides in part that "an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The seminal case in this circuit interpreting this provision is *Morgan Guaranty Trust Co. v. Republic of Palau, 971 F.2d 917 (2d Cir. 1992).* [*16] In Morgan the Court addressed the "lack of clarity in the case law" by clarifying, somewhat, the standard to apply in determining the appropriateness of attorney's fees. *Id. at 923.* The court held that a district court is afforded "a great deal of discretion and flexibility" in "fashioning awards of costs and fees," and it is now clear that a finding of "bad faith" by the removing party is not a necessary condition for granting such an award. *Id. at 924.* After Congress deleted from the language of § 1447(c) the requirement that the case be "removed improvidently," courts have interpreted that change to mean that something less than bad faith justifies the imposition of costs and fees. *Id. at 923.*

Though the Court has broad discretion to award such costs and expenses, district courts typically do not make such awards "unless the removal appears to have been frivolous and not plausibly supported by some existing

case law." *Hayman-Chaffey v. Landy, 1996 U.S. Dist. LEXIS 7245, 96 Civ. 1900, 1996 WL 282051*, at *3 (S.D.N.Y. May 28, 1996), *citing Forum Insurance Co. v. Texarkoma Crude & Gas Co., 1993 U.S. Dist. LEXIS 8463, 92 Civ. 8602, 1993 WL 228023* [*17] at *3 (S.D.N.Y. June 22, 1993).

Despite Intertec's insistence that the decision to award attorney's fees is "completely within the district court's discretion, without regard to bad faith frivolousness, colorability or the like," a careful examination of comparable cases in this circuit demonstrates that in exercising its discretion, a district court typically looks to precisely those descriptions Intertec denigrates, *to wit*, colorability, frivolousness or bad faith. Intertec's Reply Memorandum in Support of its Motion to Remand and for Costs and Expenses, at 3. See, *e.g. Natoli v. First Reliance Standard Life Insurance Co., 2001 U.S. Dist. LEXIS 2137*, *15, *00 Civ. 5914, 2001 WL 15673* at *5 (S.D.N.Y. Jan. 5, 2001)("in exercising their discretion, district courts look to whether the grounds for removal were...colorable, even if ultimately unpersuasive"), *quoting Bellido-Sullivan v. American Int'l Group, Inc., 123 F. Supp. 2d 161, 2000 WL 1738413* at *5 (S.D.N.Y. 2000)(denying award where basis for removal was "colorable"); *Agapov v. Negodaeva, 93 F. Supp. 2d 481, 484 (S.D.N.Y. 2000)*(denying motion for attorney's fees where "no evidence" existed that the removing [*18] party "acted in bad faith in seeking removal, or that her removal application was frivolous or plainly unreasonable"); *Wallace v. Wiedenbeck, 985 F. Supp. 288, 291 (N.D.N.Y. 1998)*(awarding fees where the "removal basis" was "contrary to overwhelming authority on each of the stated grounds"); *Forum Insurance, 1993 WL 228023*, at *3 (denying attorney's fees where the arguments for removal were "not frivolous and [] plausibly supported by some existing case law").

Intertec admits that "Turner's removal...was not frivolous or in bad faith, but was merely weak and not well founded." Intertec's Reply Memorandum at 4. Indeed, Turner's arguments were not well founded in the sense that they were ultimately unpersuasive. But lack of persuasiveness cannot be determinative, for that logic would establish a *per se* rule that all instances of remand for removals made in error must result in the imposition of costs and expenses against the removing party.

Though the Court believed that Turner unduly stretched the language of the Subcontract when it argued that the arbitration provisions of the General Contract applied as well to Intertec, Turner's argument, [*19] however flawed, was the result of a reasoning more complex than a simple misreading of a statute or a patently obvious ignoring of clearly applicable Second Circuit authority. As is the case with most contentious litigation, without evidence of bad faith, the parties appear to have done little more than zealously defend their clients' respective positions, using existing case law in good faith disagreement. In that regard, and as this Court's prior opinion demonstrates, the Second Circuit has been required to decide upon a number of occasions whether an arbitration clause contained in one of several related contracts should be regarded as incorporated in the others. That issue can be complex, and was so in the case at bar.

Judging by the standards of "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties," I will not exercise my discretion to award costs and expenses in this case on the basis of Turner's removal. *Frontier Insurance Co. v. MTN Owner Trust, 111 F. Supp. 2d 376, 381, citing Morgan, 971 F.2d at 923-24*. The Court believes that Turner's argument for removal was colorable, that is, [*20] plausibly supported by existing case law, "although ultimately incorrect." *Natoli, 2001 WL 15673* at *5. For that reason, the Court denies the plaintiff's request for costs and expenses, including attorney's fees, incurred as a result of Turner's removal.

B. The "Turner Project Documents"

Rule 37(b)(2), Fed. R. Civ. P., provides that a district court may impose sanctions, among them the imposition of expenses including attorney's fees, where a party fails to comply with an order of the Court directing such party to "provide or permit discovery." n3 Intertec asks the Court to award it costs and expenses, including attorneys' fees, for Turner's failure to comply with Orders of this Court to provide documentary discovery.

n3 "The court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Rule 37(b).

[*21]

The history surrounding these orders must be examined at some length.

As is the general practice of district courts, a stay of discovery was imposed in this case while the motion to compel arbitration was pending before the Court. In the Court's May 30, 2000 opinion, denying Turner's motion to compel arbitration, I vacated the stay of pretrial discovery. *Intertec, 2000 WL 709004* at *12. Turner then filed a motion of appeal with the Second Circuit.

After doing so, Turner moved this Court for a reimposition of the stay of discovery, on the grounds that the district court was divested of jurisdiction pending appeal. Oral argument was heard on that motion on October 23, 2000. Prior to the filing of this motion, however, an agreement was reached between the parties, though never filed with the Court, for a mutual exchange of documents, including the Turner project documents located at that time in Sri Lanka. At the hearing, Turner principally relied on *Bradford-Scott Data v. Physician Computer, 128 F.3d 504 (7th Cir. 1997),* in arguing that the district court was divested of jurisdiction in this case pending its appeal, pursuant to *9 U.S.C. § 16* [*22] (a)(1)(B) & (C) (allowing direct appeal from an order denying a petition to order arbitration). In giving my ruling from the bench, I announced my determination that *In re Salomon, 68 F.3d 554 (2d Cir. 1995),* the authoritative case in the Second Circuit, despite its "Delphic overtones," gives the district courts *some* discretion in continuing to supervise discovery pending an appeal under § 16(a). n4 Transcript of Oral Argument, Oct. 23, 2000 ("Transcript") at 44. While I declined to "leave the Turner interests subject to [the] full panoply of federal discovery," I exercised my "discretion to retain jurisdiction over that aspect of the case for the purpose of the agreement for a mutual exchange of documents, which is clearly reflected in the correspondence," and which both parties agreed they had accepted. Transcript at 46-47, 50-51. To that end, the Court granted Turner's motion to reimpose the stay, "provided, however, that this Court retains jurisdiction and does not include within the stay of further proceedings any disputes, complaints, or demands for relief which may arise out of, and require the resolution of...the mutual agreement for disclosure of documents. [*23] " Transcript at 51.

n4 A detailed examination of the case law in this area is not necessary to decide this motion. It is sufficient to say that both of the other courts in the Southern District of New York that have dealt with the question of how to interpret In re Salomon have concluded that it does not absolutely prohibit district courts from taking any action on a case pending an appeal on the question of arbitrability. See *Cendant Corp. v. Forbes, 72 F. Supp. 2d 341, 343 (S.D.N.Y. 1999)* (holding that a denial of a stay may be granted "in *at least*" cases where the appeal is frivolous or improper, adding "there may be still other bases for denying the stay here sought...") (emphasis in original); *Satcom v. Orbcomm, 55 F. Supp. 2d 231, 235-236 (S.D.N.Y. 1999)* (holding that In re Salomon "does not provide a clear answer" to the question, and deciding the issue under the approach taken in the Seventh Circuit's Bradford opinion). I conclude that In re Salomon grants the district court discretion to take action during the pendency of the appeal, so long as it is "very carefully exercised and in a distinctly limited fashion." Transcript at 44.

[*24]

Though I expressed my hope that the "increasingly shrill" nature of the exchange of correspondence in this case would become "more calm," Transcript at 50, those hopes were dashed by the subsequent deluge of papers seamlessly faxed to Chambers through the fall and winter of 2000, while conflicts surrounding production of the Turner project documents metastasized.

At least as early as September 25, 2000 a conflict surfaced with regard to the Turner project documents. On that date Intertec asked the Court to direct Turner to send the documents from Sri Lanka by air and not by sea. Letter to the Court dated September 25, 2000. In response, Turner acknowledged that it had been trying to obtain the documents since at least July 2000, and noted that it had advised Intertec that the documents would not likely arrive in the United States until "the end of August or the beginning of September." Turner's Letter to the Court dated September 27, 2000. Turner expressed its understanding that the documents would be placed aboard a vessel and "arrive in New York within 30 days thereafter." Id. at 1-2. As would be repeated again and again in the months to come, Turner emphasized its lack of [*25] "control over the actions of the Sri Lankan authorities," allegedly responsible for the delay. Id. at 2.

In response, the Court issued an Order, dated September 27, 2000, directing Turner to send the documents by "the first commercial aircraft available" if it could not confirm, by October 3, that the documents were "laden on board a vessel that has commenced her ocean voyage with an E.T.A. New York within 30 days of the date of sailing."

Turner responded that while it had not "technically complied with the Court's Order," the documents were destined to leave on October 5, 2000 aboard the "Kamakura" to arrive in New York on October 27, 2000. Letter to the Court dated October 2, 2000. Intertec offered to recognize this transport arrangement as "within the spirit of Your Honor's order," so long as Turner provided documentation that the documents were laden on board as alleged. Intertec Letter to Court dated October 2, 2000.

In response, I ordered Turner to furnish Intertec with a bill of lading "as soon as it is available." Order dated October 4, 2000.

On October 17, 2000 Turner notified the Court that, to its surprise, the documents were not loaded upon the Kamakura "due to [*26] a work slowdown at the port." Turner Letter to the Court dated October 17, 2000. A second letter that day informed the Court that the documents were loaded instead upon "the ship identified as the 'Singapore Bay,'" set to leave Sri Lanka on October 17, 2000 and arrive in New York November 7, 2000.

Intertec wrote the Court to express its dissatisfaction with Turner's explanation. Intertec Letter to the Court dated October 17, 2000. It accused Turner of violating the Court's September Order by not sending the documents by air after learning they were not aboard the Kamakura. Turner's response to Intertec's allegation was that sending the documents by air would have taken longer than placing them aboard the second ship, as they had already cleared customs. Letter to the Court dated October 20, 2000.

The Court held a hearing, on October 23, 2000, on Turner's motion to stay discovery. At that time I made no rulings on the question of whether Turner had violated any orders of the court. It was at that hearing that I expressed my hope for a cease fire. After some days of peace, the battle resumed.

On November 10, 2001, Turner learned that the documents were not aboard the Singapore Bay [*27] and decided, it claimed, to send the documents by air to New York, "anticipating that the documents will arrive by airfreight, via London, in New York by Tuesday, November 21, 2000." Turner's Letter to Intertec dated November 13, 2000, sent to the Court November 13, 2000. Despite prior assurances from counsel at the October hearing that it was so "absolutely remote" as to be a "far-flung possibility" that the documents would not arrive on the Singapore Bay, that is precisely what happened. Transcript at 31, 33.

In response to these developments, and a request by Intertec for a conditional order of dismissal if the documents were not delivered by November 22, 2000, the Court issued another order dated November 15, 2000. Intertec Letter to the Court dated November 14, 2000. The Court ordered Turner "to make the project documents available to counsel for Intertec not later than November 27, 2000," with the additional order that failure to comply would result in a $ 1000 fine holding Turner in contempt, with the fine doubling each succeeding business day. The Court rejected Intertec's application for a conditional default order.

On November 21, 2000, Turner wrote to the Court requesting [*28] a one week extension until December 4, 2000, to produce the documents. Letter to the Court dated November 21, 2000. This time, the delay was attributed to holiday closings of the U.S. Customs offices at JFK airport in New York. After initial reluctance, Intertec conceded, in a letter dated November 21, 2000, to the December 4, 2000 date for exchange. The Court then granted the extension of time to not later than December 4, 2000, by Order dated November 22, 2000.

The documents began to be exchanged on December 4, 2000, as confirmed by a telephone conference the Court held with the parties on that date. Though, predictably, disputes continued on matters ranging from the proper method of Bates-stamping to document privilege and competing drafts of a confidentiality agreement, each of which were dutifully brought to the Court's attention, those matters are not relevant to deciding this motion.

As a critical component of the Court's continued jurisdiction with respect to this discrete area of discovery, the Court retains the authority to impose Rule 37(b)(2) sanctions for violations of Court orders which manifest that continued supervision. See *Britton v. Co-op Banking Group, 916 F.2d 1405, 1410-1412 (9th Cir. 1990)*. [*29] n5

n5 Turner is simply incorrect, and cites no authority for the proposition, that the Court may not now invoke the Federal Rule of Civil Procedure, at Rule 37 or otherwise, to award expenses including attorneys fees. While the Court denied Intertec the benefits of the full panoply of tools available to parties under those Rules, the Court explicitly retained its supervisory authority with respect to the discovery of these items. Transcript at 46-51.

In order to decide whether an award is appropriate, the Court must decide, in accordance with Rule 37(b)(2), whether Turner violated a Court order without substantial justification. To do so, the Court must revisit these orders.

In the Court's September 27, 2000 Order I stated that the plan articulated in Turner's letter to the Court, announcing that the documents would be placed aboard a vessel "this week" (meaning the week of September 24 through September 30, 2000) for shipment to New York, was acceptable "if it is followed." The Court instructed, however, that [*30] if "by October 3, 2000 [the following Tuesday] counsel for Turner cannot confirm and represent to the Court that the documents are in fact laden on board a vessel that has commenced her ocean voyage with an E.T.A. New York within 30 days of the date of sailing, the Turner interests are directed to cancel plans for ocean shipment of the documents and arrange for their transportation by the first commercial aircraft available through the exercise of due diligence."

On October 2, 2000 Turner informed the Court that it had not "technically complied with the Court's Order," insofar as it allowed the documents, at that time, to be laden aboard the Kamakura scheduled to depart three days later, on October 5. Indeed, as Turner conceded, this was a violation of the Order, which required that Turner send the documents by air if it learned that the documents were not, by October 3, "laden on board a vessel *that has commenced* her ocean voyage." (emphasis added). As the Kamakura had not yet commenced her voyage, Turner ought to have sent the documents by air, as instructed. Turner's explanation for the violation, given *ex post*, is unavailing. Though in different circumstances a few days [*31] delay in sending the documents might be tolerable, in the context of many months delay, alleged by Turner to have been caused by transport problems beyond its control, the necessity of strict compliance with the letter of the Court's remedial Order of September 27, 2000 should have been obvious to Turner. It was not Turner's call to make in deciding to place the documents aboard ship once it was clear that they were not sailing by October 3, 2000. The Court should have been notified immediately, as required, that the documents were not aboard a vessel by October 3.

The Court's next Order, dated October 4, 2000, instructed Turner to furnish Intertec with a bill of lading as soon as possible. Instead of doing so, Turner wrote to inform that the documents would not appear on a bill of lading, because the documents were not placed aboard the Kamakura, but would instead be placed upon the Singapore Bay. Placing the documents aboard a second ship clearly violated the nature of the Court's September 27, 2000 Order. In no uncertain terms, the Court required delivery by air if the documents were not en route to New York via sea by October 3. Additionally, to the Court's knowledge, no bills [*32] of lading were ever sent with respect to either attempted shipment, which comes as no surprise in retrospect because Turner failed to arrange for their delivery aboard any ship.

The Court's November 15, 2000 Order required Turner, who decided at that point to send the documents by air after learning that they were in fact not placed on the second vessel either, to make the documents available to Intertec not later than November 27, 2000. The Court subsequently, on November 22, 2000, granted a one week extension until December 4, 2000 to exchange the documents.

Having reviewed the sequence of orders issued in this case, it is clear to the Court that Turner violated the September 27, 2000 Order. That violation was fundamental and material, rather than technical and nonprejudicial. Turner's proferred excuse, that shipping by air would have generated further customs delays, was belatedly expressed and has the tinny ring of an afterthought. n6

n6 I think it only fair to note at this point that, for all that appears from the record, the events described in text were controlled by the Turner personnel in Sri Lanka, rather than by Turner's counsel in New York, who perforce had to rely upon what their clients were telling them.

[*33]

Though the Court accepts, having before it no evidence to conclude otherwise, that "unforeseen communication and transportation problems [] caused a delay in the exchange," rather than the delay being caused by any improper motives, the fact remains that Turner was obliged under Court order to send the documents by mail if they were not laden upon a ship by October 3, 2000. The documents were not so laden, Turner was made aware of such, and made the decision, nonetheless, to try placing the documents aboard two successive ships rather than send them by air as required. Even assuming those decisions were made with the best of intentions, they were made in error, and Turner had no right to make them, as it was obliged by the Court to act otherwise. There is no "substantial justification" for its failure to comply with the Court's Order of September 27, 2000. Turner's failure to provide a bill of lading is further evidence of its blase attitude toward the orders of this Court. As subsequent events made clear, the documents would have been produced much earlier had they been placed upon a commercial air flight after learning that they were not aboard a vessel that had set sail by October [*34] 3. That was the purpose of the Court's September 27, 2000 Order.

In view of the foregoing, the Court awards the plaintiff its costs and expenses, including attorney's fees, incurred as a result of the violation of the Court's order to send the documents by air in the circumstances that developed.

Sanctions under Rule 37(b)(2) are available "after the court has ordered compliance and the party ordered has nonetheless failed" to comply with a discovery demand. *Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 225 (2d Cir. 1999).* The decision to award reasonable expenses, including attorneys' fees, pursuant to Rule 37, is reviewed for an abuse of discretion, and the court's factual findings will not be disturbed unless they are shown to be "clearly erroneous." *Thomas Hoar, Inc. v. Sara Lee Corp., 882 F.2d 682, 687 (2d Cir. 1989), citing Inwood Laboratories v. Ives Laboratories, 456 U.S. 844,* *855, 72 L. Ed. 2d 606, 102 S. Ct. 2182 (1982).* As the court in Thomas Hoar correctly noted, "discovery was designed to proceed at the initiative of the parties with a minimum of court intervention. The rulemakers framed Rule 37 in recognition [*35] of the potential for abuse during the discovery process." *882 F.2d at 687.* For that reason, failure to comply with discovery orders justly allows the court to impose costs upon the failing party. See, *e.g. Selletti v. Carey, 173 F.3d 104, 110 (2d Cir. 1999)* (upholding imposition of a monetary sanction pursuant to Rule 37(b)(2) where party failed to comply with discovery requirement). The Second Circuit has repeatedly stated the importance of following discovery orders of the Court, warning that "[a] party who flouts such orders does so at his peril." *Sieck v. Russo, 869 F.2d 131, 134 (2d Cir. 1989)* (internal citations omitted).

Intertec must now document the expenses and fees claimed, supported by time records in the form required by Second Circuit law, *New York State Ass'n for Retarded Children Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983),* and must demonstrate to the Court that those expenses were a direct result of Turner's violation. The Court makes no ruling at this time on whether any recoverable fees or expenses were in fact incurred by Intertec.

III. CONCLUSION

For the foregoing reasons, plaintiffs' request for costs [*36] and expenses, including attorney's fees, as a result of Turner's removal of this case is denied.

Plaintiffs' request for costs and expenses, including attorney's fees, incurred as a result of the delayed exchange of the Turner project documents is granted.

In these circumstances, Intertec is directed to file and serve its papers in support of a claim for fees and expenses consistent with this Opinion, on or before August 3, 2001. Turner is directed to file and serve opposing papers on or before August 17, 2001. Turner is directed to file and serve opposing papers on or before August 17, 2001. After considering these submissions, the Court will determine the necessity of an evidentiary hearing.

It is SO ORDERED.

Dated: New York, New York

July 17, 2001

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATED DISTRICT JUDGE

EX. 23
APP. 158 - 165

North River Ins. Co. v. Transamerica Occidental Life Ins. Co.N.D.Tex.,2002.Only the Westlaw citation is currently available.

United States District Court, N.D. Texas, Dallas Division.

THE NORTH RIVER INSURANCE COMPANY and United States Fire Insurance Company, Plaintiffs,

v.

TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY, Defendant.

No. Civ.A. 399-CV-0682-L.

June 12, 2002.

MEMORANDUM OPINION AND ORDER

LINDSAY, J.

*1 Before the court is Plaintiffs' Pre-Trial Brief in Support of Petition to Compel Arbitration, filed March 26, 2002; Defendant's Brief on the Issue of Compelling Arbitration, filed April 18, 2002; and Plaintiffs' Reply Brief in Support of Petition to Compel Arbitration, filed May 3, 2002.[FN1] After having reviewed the parties' briefs, the evidence submitted, and the applicable law, the court grants Plaintiffs' motion to compel arbitration and sanctions Plaintiffs for their failure to comply with orders of the court.[FN2]

FN1. The court construes Plaintiffs' "Pre-Trial Brief in Support of Petition to Compel Arbitration" as a motion to compel arbitration made pursuant to sections 4 and 6 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* Although the pretrial brief does not comply with the formal requirements for the submission of a motion under the Federal Rules of Civil Procedure or with our Local Rules, the court granted Transamerica additional time to respond to the issues presented by Plaintiffs' brief. In response, Transamerica filed its own brief, accompanied by a number of exhibits, to which Plaintiffs submitted a reply. Accordingly, the court construes Plaintiffs' pretrial brief as a motion and rules on the issues therein contained.

FN2. By request of the court, the parties also filed briefs to address certain evidentiary issues. On April 18, 2002, Transamerica filed Defendant's Brief on Evidentiary Issues. Plaintiffs filed their Brief in Response to Transamerica's Brief on Evidentiary Issues on may 3, 2002. After having reviewed the evidence submitted by Plaintiffs, the parties' briefs, and the applicable law, the court overrules Defendant's objections.

I. Factual and Procedural History

A. Factual History

In 1985, Plaintiffs United States Fire Insurance Company ("U.S.Fire") and North River Insurance Company ("North River") were subsidiaries of Crum & Forster, Inc. ("C & F"). At that time, the Aviation Office of America, Inc. ("AOA") was a Texas insurance company that acted as the managing general agent for C & F's aviation insurance business. As the managing general agent, AOA issued insurance policies on behalf of U.S. Fire and North River to cover worker's compensation claims made by workers in the aviation industry. AOA also arranged reinsurance protection for those policies.

The Zimmerman, Green Line Slip ("Line Slip") was a reinsurance pool which invested funds from a group of subscribers in various reinsurance contracts. The subscribers to the Line Slip were insurance companies that contracted with a pool manager to act as the agent for the member companies. In 1985, Zimmerman, Green Incorporated ("ZGI") acted as the managing agent for the Line Slip. ZGI entered into management agreements with each of its subscribers. These management agreements authorized ZGI to enter into reinsurance contracts on behalf of each subscriber, and specified the maximum percentage share to which ZGI was allowed to bind each participant.

Effective January 1, 1985, Defendant Transamerica Occidental Life Insurance Company ("Transamerica") entered into a management agreement with ZGI (the "1985 Management Agreement"). Under the terms of the agreement, Transamerica authorized ZGI "to bind and accept for the purpose of procuring, underwriting, and servicing, on [Transamerica's] behalf, reinsurance of other insurance or reinsurance compan[ies]." Transamerica further agreed to accept a certain portion of the total risk borne by the reinsurance pool. Under the 1985 Management Agreement, Transamerica subscribed to a 23 .53 percent share in the Line Slip. The 1985 Line Slip subscribers, and their corresponding shares of the 1985 reinsurance pool, included the following member companies: (1) Transamerica (23.53 percent); (2) Beneficial Life Insurance Company (23.53 percent); (3) Federal Insurance Company (5.88 percent); (4) North American Life and Casualty Company (17.66 percent); (5) Oxford Life Insurance Company (11.76 percent); (6) Republic National Life Insurance Company (5.88 percent); (7) State Mutual Life Insurance Company of America (11.76 percent).

*2 By 1987, ZGI had changed its name to Zimmerman Line Slip, Inc. ("ZLSI"). In 1987, Transamerica entered into a similar management agreement with ZLSI (the "1987 Management Agreement"). Pursuant to the 1987 Management Agreement, Transamerica subscribed to a 6.81 percent share of the 1987 Line Slip. Similar to the 1985 Line Slip, the 1987 Line Slip was composed of a group of member insurance companies that subscribed to a specific share of premiums and losses arising from reinsurance contracts entered into on their behalf by ZLSI.

Effective December 15, 1985, ZGI entered into two reinsurance contracts ("treaties") with AOA (the "1985 Treaties") on behalf of the 1985 Line Slip. The first treaty, the "Primary Treaty," provided reinsurance for those policies issued by AOA on behalf of U .S. Fire and North River for losses up to $250,000. The second treaty, the "Excess Treaty," provided reinsurance for losses up to $750,000 beyond the first $250,000. Both treaties were "quota share" treaties. Under a "quota share" treaty, a group of reinsurers agrees to accept a fixed percentage of all risks declared under the treaty. Under both the Primary and Excess Treaties, for example, ZGI contracted on behalf of the 1985 Line Slip for 25 percent of the total risk declared under the Treaty. FN3 The remaining percentage of risk was divided between a number of other insurance carriers. Both Treaties were renewed as of January 1, 1987, until December 31, 1987 (the "1987 Treaties").

FN3. Transamerica, as a subscriber the 1985 Line Slip, was responsible for 25.53 percent of 25 percent of the total risks declared under the 1985 Treaty with AOA. Similarly, Transamerica would accept 25.53 percent of 25 percent of the premiums due under the Treaty. Under the 1987 Treaties, Transamerica would accept 6.81 percent of 25 percent of the total risks and premiums.

Under the terms of the 1985 and 1987 Treaties, reinsurers who were not admitted in the State of New York were required to post letters of credit as security for the payment of known and reported losses. On or about December 1, 1986, AOA requested letters of credit from Transamerica and from the other non-admitted line slip subscribers to secure their percentage share of the reported losses under the 1985 Treaty. Instead of obtaining letters of credit from Transamerica and the other non-admitted 1985 Line Slip subscribers, ZGI represented that one of the admitted 1985 Line Slip subscribers, State Mutual Insurance Company ("State Mutual"), would act as a "front" for the shares of the other non-admitted members. FN4 Under the 1987 Treaties, ZLSI represented that Business Men's Assurance Company of America ("BMA") would act as the front.

FN4. As explained by Judge Lifland:
Fronting occurs when one reinsurer ("A") agrees to indemnify ... "ceding" company ("B") if B sustains losses that are within the scope of the reinsurance coverage provided by the agreement between A and B. However, suppose reinsurer C wants to participate in reinsuring A, but may not do so for whatever reason. C can then enter into an agreement with B in which B agrees to represent C in the reinsurance agreement with A. For example, if B wants to participate in the reinsurance agreement for a 10% share and C for a 15% share, under a fronting agreement, B would enter into an agreement with A for a 25% [share] and then collect and distribute losses and premiums from C as appropriate (15%). In this case, C has an interest in the business assumed, albeit an indirect one, through B, which is "fronting."
General America Life Ins. Co. v. International Insurance Co., Civ. Action No. 98-5588(JCL), slip op. at 3 n. 1 (D.N.J. Jan. 3, 2000).

In effect, ZGI added the percentage interests of the non-admitted Line Slip members and represented their interests in the 1985 Line Slip under the admitted fronting company. For example, ZGI signed the 1985 treaties representing the Zimmerman Line Slip membership as:

Federal Insurance Co. (Chubb Group)	5.88%
North American Life and Casualty Co.	17.66%
State Mutual Life Assurance Co. of America	76.46%

The signature pages of the 1985 Treaties indicates that State Mutual owns a 76.46 percent share of the 1985 Line Slip. This 76.46 percent share, however, is the aggregate share of the shares owned by all of the non-admitted insurance companies that subscribed to the 1985 Line Slip. Similarly, the signature pages on the 1987 Treaties represent the 1987 Line Slip participation as follows:

Beneficial Life Insurance Co.	10.23%
Business Men's Assurance Co. of America	54.54%
Provident Mutual Life Ins. Co.	6.82%
Resources Life Ins. Co.	10.23%
Security Benefit Life Ins. Co.	11.36%
State Mutual Life Ins. Co. of America	6.82%

*3 On the 1987 Treaties, BMA's share represents the aggregate shares owned by the non-admitted subscribers to the 1987 Line Slip. As a result of these fronting arrangements, Transamerica's interests in the reinsurance arrangements with AOA does not appear on the signature lines of either the 1985 or the 1987 Treaties.

ZGI (and later ZLSI) (collectively, the "Zimmerman entities") never sought authorization from, nor entered into any agreement with, either State Mutual or BMA to front for Transamerica's obligations under the treaties. Premiums under the treaties, however, were collected and distributed according to the percentage shares of the 1985 and 1987 Line Slip, rather than the percentages specified on the signature pages of the Treaties. Transamerica accepted premiums and paid cash calls from AOA according to its Line Slip membership, even though Transamerica's participation in Line Slip is not noted on either of the Treaties.

Both the 1985 and the 1987 Treaties contain an arbitration clause .[FN5] In 1992, Plaintiffs commenced an arbitration proceeding against all of the reinsurers, including the Zimmerman Line Slip, with respect to certain disputes under the Treaties. In 1993, the Zimmerman Line Slip appointed its party-designated arbitrator. In 1995, the Zimmerman Line Slip ceased functioning, and since that time, Transamerica has denied liability under the Treaties.

FN5. The arbitration clauses in the 1985 and 1987 Treaties are identical and provide as follows:
If any dispute shall arise between the Reinsurer and the Reassured, either before or after termination of this Contract, with reference to the interpretation of this Contract or the rights of either party with respect to any transaction under this Contract, the dispute shall be referred to three arbitrators, one to be chosen by each party and the third by the two so chosen.... The arbitration shall take place in the State of Texas and the arbitration proceedings are to be governed by rules of the American Arbitration Association and the Texas State Arbitration Law.

B. Procedural History

Plaintiffs commenced this action on March 2, 1999, by filing their Original Petition in the District Court of Dallas County, seeking an order compelling arbitration under the TGAA. Transamerica removed from state court based on diversity of citizenship on March 29, 1999. On September 27, 1999, Plaintiffs moved for leave to file their first amended petition.

By order dated January 27, 2000, this court granted Plaintiffs' motion to file an amended petition and stated:
In granting Plaintiffs' motion, the court notes that Plaintiffs' Amended Complaint requests the court to enter an order compelling arbitration. Plaintiffs requested this same relief in their original petition. *If Plaintiffs, however, desire for the court to enter an order compelling arbitration, they must petition the court for such relief by submitting a properly filed motion. See* 9 U.S.C. § 4.

(emphasis added). Plaintiffs, however, never filed a motion to compel Transamerica to arbitrate. On July 19, 2000, Plaintiffs moved for a default judgment against Transamerica. By Order dated March 30, 2001, this court denied Plaintiffs motion and again instructed Plaintiffs to file a motion to compel arbitration, stating:Both parties appear to raise issues that may be dispositive of this case. Plaintiffs contend that this case should be arbitrated and request ... an order compelling arbitration. Defendant, on the other hand, contends that Plaintiffs lack standing to pursue this action, and therefore the court lacks subject matter jurisdiction. These are matters that should be addressed by motions. Accordingly, if any party intends to pursue an issue that may be dispositive of this case, it is directed to file a dispositive motion on the issue(s) no later than May 31, 2001.

*4 (emphasis in original). Despite having *twice* admonished Plaintiffs to submit a properly filed motion to compel arbitration, Plaintiffs have not done so. Instead, the parties submitted their pretrial materials in anticipation of the pretrial conference held on March 28, 2002.

On the eve of the pretrial conference, Plaintiffs submitted their "Pre-Trial Brief in Support of Petition to Compel Arbitration." In their briefing papers, Plaintiffs requested an evidentiary hearing and an order compelling arbitration. On the day of the pretrial conference, Plaintiffs submitted three binders of trial exhibits. Because the Defendant had not received Plaintiffs "Pre-Trial Brief" until the morning of the pretrial conference, and because the Defendant objected to many of the exhibits contained in the binders, the court continued the pretrial conference to allow for additional briefing. The matter having been fully briefed, the court now considers the issues presented.

II. Analysis

Plaintiffs contend that Transamerica is a party to the 1985 and 1987 Treaties, and as a party, is subject to the arbitration provisions contained in the contracts. Transamerica contends that it is not subject to the arbitration clause in the 1985 and 1987 Treaties because it never signed the contracts. In the alternative, Transamerica contends that Plaintiffs waived their right to pursue arbitration under the agreements by pursuing their claims in court.

A. Plaintiffs' Motion to Compel Arbitration

Transamerica first contends the FAA preempts Plaintiffs' claims under the TGAA. The FAA does not preempt state arbitration rules if the state rules do not undermine the goals and policies of the FAA. *Volt Informational Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Both federal and Texas state law favor arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983); *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex.1996). Further, the Fifth Circuit has held that the Texas General Arbitration Act ("TGAA") can govern the scope of an arbitration agreement without undermining the federal policy underlying the FAA. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 247-48 (5th Cir.1998). Accordingly, the court applies Texas law in determining the scope and applicability of the arbitration clause in this case.

Under Texas law, a party seeking to compel arbitration must establish: (1) the existence of a valid agreement to arbitrate; and (2) that the claims asserted by the party attempting to compel arbitration are within the scope of the arbitration agreement. *ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 311 (5th Cir.1999); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex.1999). Texas law provides "[i]f a party opposing an application [for arbitration] denies the existence of the agreement, the court shall summarily determine that issue." Tex. Civ. Prac. & Rem.Code Ann. § 171.021. "If the facts shown by the affidavits, pleadings, discovery, and stipulations are undisputed, the trial court should hold a summary hearing, rather than a full evidentiary hearing, and apply the terms of the arbitration agreement to the facts." *ASW Allstate*, 188 F.3d at 311. "[I]f the material facts necessary to determine the issue are controverted by an opposing affidavit or otherwise admissible evidence, the trial court must conduct an evidentiary hearing to determine the disputed facts." *Id.* (*quoting Howell Crude Oil Co. v. Tana Oil & Gas Corp.*, 860 S.W.2d 634, 639 (Tex.App.-Corpus Christi 1993, no writ).

*5 A court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex.App.-Houston 1993, writ denied). "Courts must indulge every reasonable presumption in favor of arbitration, and all doubts as to the arbitrability of an issue must be decided in favor of arbitration." *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753 (Tex.2001). The party opposing arbitration bears the burden of proving that no valid arbitration agreement exists as to the dispute. *Fridl v. Cook*, 908 S.W.2d 507, 511 (Tex.App.-El Paso 1995, writ dism'd w.o.j.).

Notwithstanding the strong federal and state policies in favor of arbitration, arbitration is nevertheless a matter of contract law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). Under this principle, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Air Line Pilots Assoc. v. Miller*, 523 U.S. 866 (1998); *Volt*, 489 U.S. at 478 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."); *EEOC v. Waffle House*, 122 S.Ct. 754, 763 (2002) (stating "we look first to whether the parties agreed to arbitrate a dispute ... It goes without saying that a contract cannot bind a non-party."). Here, Transamerica asserts that Plaintiffs have produced no written agreement binding the parties to arbitration. Specifically, Transamerica contends that it is not a party to the 1985 and 1987 Treaties because it is not listed as on the signature page along with the other members of the 1985 and 1987 Line Slips. The court disagrees.

Courts have recognized a number of theories arising out of common-law principles of contract and agency law to bind non-signatories to the arbitration agreements of others. *See Thompson-CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 776 (2d Cir.1995) (stating "a non-signatory party may be bound by the 'ordinary principles of contract and agency.'"); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir.1986) (same); *Grigson v. Creative Artists Agency, L.L.C.*, 219 F.3d 524, 532 (5th Cir.2000) (dissenting opinion, reciting applicable law). For example, courts have recognized at least five theories for binding non-signatories to arbitration agreements, including: (1) alter ego or veil piercing; (2) incorporation by reference; (3) assumption of the arbitration agreement; (4) agency; and (5) equitable estoppel. *See Thompson.-CSF, S.A.*, 64 F.3d at 776. Using tradition principles of agency law, if a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered by that agreement. *See Pritzker v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir.1993); *see also Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir.1990) (applying arbitration provision to non-signatory agents of corporation that was party to arbitration agreement). Similarly, an undisclosed principal may enforce a contract made for its benefit by an agent even though the signatory to the arbitration clause was unaware of the existence of the principal. *See Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4, 6-7 (2d Cir.1981). The principles of agency law have been further applied to bind non-signatory business entities to arbitration agreements. *See Pritzker*, 7 F.3d at 1122 (citing cases).

*6 In this case, traditional principles of agency law demonstrate that Transamerica was a party to the 1985 and 1987 Treaties entered into between AOA and the Zimmerman entities. Under Texas law, a principal is liable for contracts made by its agent acting within the scope of the agent's authority. *See, e.g.*, *Medical Personnel Pool of Dallas, Inc. v. Seale*, 554 S.W.2d 211, 213 (Tex.App.-Dallas 1977, writ ref'd n.r.e.); *Ross F. Meriwether & Assoc., Inc. v. Aulbach*, 686 S.W.2d 730, 731 (Tex.App.-San Antonio 1985, no writ) ("An agent is not a party to, nor individually liable on a contract he enters into on behalf of his principal. It is the principal who enters into the contract.") Further, "a grant of authority to an agent includes the implied authority to do all things proper, usual, and necessary to exercise that authority." *Sheet Metal Workers Local Union No. 54 v. E.F. Etie Sheet Metal Co.*, 1 F.3d 1464, 1471 n. 6 (5th Cir.1993) (holding bargaining association impliedly authorized to enter into arbitration clause on behalf of its members, stating "an agent's power to use an arbitration clause includes the power to enter and to invoke it").

Transamerica cannot dispute that it was a subscriber to the 1985 and 1987 Line Slips, or that the Zimmerman entities acted as its duly authorized agents. The evidence demonstrates that Transamerica entered into a series of management agreements with the Zimmerman entities authorizing these entities to bind Transamerica to reinsurance contracts. The agency between Transamerica and the Zimmerman entities expressly authorized the Zimmerman entities "to bind and accept" on Transamerica's behalf, "in the procuring, underwriting, and servicing of Reinsurance Contract(s)." Pursuant to this authority, the Zimmerman entities entered into 1985 and 1987 reinsurance Treaties with AOA. Accordingly, the court concludes that Zimmerman entities, acting as Transamerica's authorized agents, bound Transamerica to the reinsurance Treaties at issue in this case.

That Transamerica does not appear on the signature page of the 1985 and 1987 Treaties is of no moment. Under Texas law, an undisclosed principal may be held liable, even when his agent acts without authority, if the principal retains the benefits of the transaction. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex.1980) ("When the benefits received are the direct, certain, and proximate result of the agent's unauthorized act, retention of those benefits after the principal acquires knowledge of the transaction constitutes affirmance of the act and ratification of the transaction."). A principal ratifies a contract when he retains the benefits of the transaction after acquiring full knowledge, even though he had no knowledge originally of the unauthorized act of his agent. *See id.*; *Hornblower & Weeks-Hemphill, Noyes v. Crane*, 586 S.W.2d 582, 588 (Tex.Civ.App.-Corpus Christi 1979, writ ref'd n.r.e.). Plaintiffs have submitted abundant evidence demonstrating that Transamerica received premiums and paid losses in accordance with the terms of the 1985 and 1987 Treaties. Moreover, the evidence indicates that Transamerica received premiums and paid losses in proportion to its Line Slip share for its given years of participation. Transamerica failed to controvert any of this evidence. Based on these facts, the court concludes that Transamerica ratified the contracts at issue.

*7 Transamerica's ratification of the Treaties includes ratification of the arbitration provisions. A principal's ratification of an agent's act extends to the entire transaction. *Id.* at 757 ("A principal may not, in equity, ratify those parts of the transaction which are beneficial and disavow those which are detrimental."); *Condor Petroleum Co. v. Greene*, 164 S.W.2d 713, 721 (Tex.Civ.App.-Eastland, 1942, writ ref'd w.o.m.) (stating "principal who ... retains the benefits of a contract ... cannot repudiate that part of the contract which is unsatisfactory to him"). Transamerica therefore may not, on the one hand, accept premiums due under the 1985 and 1987 Treaties, and on the other hand, refuse to comply with the express provisions of the agreement.

Based on the substantial evidence submitted by the Plaintiffs, and the lack of relevant evidence submitted by the Defendant, the court concludes Transamerica has not carried its burden of proving that no valid arbitration agreements exists as to the dispute between the parties. On the contrary, the court finds that the uncontroverted evidence submitted by the Plaintiffs conclusively establishes the existence of a valid agreement to arbitrate. The evidence further demonstrates that Transamerica is a party to such an agreement by virtue of its agency relationship with the Zimmerman entities. Finally, the court finds that Plaintiffs claims fall within the scope of the arbitration agreements.

B. Waiver

Transamerica next contends that Plaintiffs waived their arbitration rights by substantially invoking the litigation process. The legal standard for determining waiver is the same under both the FAA and TGAA. *See Sedillo v. Campbell*, 5 S.W.3d 824, 826 (Tex.App.-Houston [14th Dist.] 1999, no writ). There is a strong presumption against waiver of arbitration. *See, e.g.*, *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1164 (5th Cir.1987) ("Waiver of arbitration is not a favored finding and there is a presumption against it."). A party alleging waiver carries a heavy burden. *Associated Builders v.*

Ratcliff Constr. Co., 823 F.2d 904, 905 (5th Cir.1987), and "all doubts regarding waiver should be resolved in favor of arbitration." *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 594 (Tex.App.-Houston [14th Dist.] 1999, pet. filed).

A court may find a party has waived its right to arbitrate when "the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Subway Equipment Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir.1999) (internal quotations omitted); *Valero Energy Corp.*, 2 S.W.3d at 594. The waiver, however, must be intentional, *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex.1996), and "may only be implied from a party's actions if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right." *Valero Energy Corp.*, 2 S.W.3d at 594; *see also* *Subway Equipment Leasing Corp.*, 169 F.3d at 329 (stating a party "must, at the very least, engage in some overt act in court that evinces a desire to resolve the arbitrable dispute through litigation rather than arbitration"). Prejudice, in this context, "refers to inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *Subway Equipment Leasing Corp.*, 169 F.3d at 327.

***8** With this standard in mind, the court finds Transamerica has not demonstrated that Plaintiffs waived their right to arbitrate this matter. Since removal to this court, Plaintiffs have moved to file an amended complaint, moved to seek a default judgment, pursued their rights of discovery under the Federal Rules of Civil Procedure, and moved to take deposition testimony after the discovery deadline. These activities fall well short of what is required to establish waiver under the applicable standard in this circuit. *See, e.g.*, *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 661 (5th Cir.1995) (finding *no* waiver despite removing action to federal court, filing a motion to dismiss, filing a motion to stay proceedings, answering complaint, asserting a counterclaim, and engaging in discovery); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576-77 (5th Cir.1991) (finding *no* waiver despite serving interrogatories, requesting production of documents, attending pretrial conference, and waiting thirteen months before seeking to compel arbitration); *Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 420-21 (5th Cir.1985) (finding *no* waiver despite seeking a stay, filing an answer to complaint, serving interrogatories, requesting production of documents, moving for a protective order, agreeing to a joint motion for continuance, requesting an extension of the discovery period, and waiting eight months before seeking to compel arbitration). Similarly, the court finds no evidence of prejudice as it is defined in this context.

Having found Plaintiffs have not waived their arbitration rights under the 1985 and 1987 reinsurance Treaties, the court believes the dispute between the parties must be submitted to arbitration in accordance with the agreement. Accordingly, the court compels arbitration in accordance with the TGAA and the arbitration provisions contained in the 1985 and 1987 Treaties.

C. Sanctions

Finally, the court believes sanctions are appropriate in light of Plaintiffs' disregard of two court orders. The court's orders were plain and unequivocal. Plaintiffs' failure to submit a properly filed motion to compel arbitration within the time constraints set forth by the court's orders caused unnecessary delay in the disposition of this matter. Had Plaintiffs filed their briefing papers in accordance with the court's instructions and served them on the Defendant before the eleventh hour, the court could have ruled on these issues well in advance of the trial setting. As a result of Plaintiffs' conduct, however, precious court time was wasted, causing the court to delay the resolution of other cases and the Defendant to incur additional expenses in the preparation for trial. For example, Defendant was required to amend and resubmit its pretrial materials and attend a pretrial conference, all of which was rendered unnecessary by Plaintiffs' untimely motion. Because these additional expenses incurred by Defendant was a direct result of Plaintiffs' failure to adhere to *two* prior orders, the court concludes they should be sanctioned for such failures.

***9** Defendant urges the court to dismiss Plaintiffs' arbitration claim with prejudice. "A dismissal with prejudice is appropriate only if the failure to comply with the court's order was the result of purposeful delay or contumaciousness, and the record reflects that the district court employed lesser sanctions before dismissing the action." *Long v. Simmons*, 77 F.3d 878, 880 (5th Cir.1996) (citation in footnote omitted). Finding no record of contumacious conduct or purposeful delay, the court believes dismissal of the arbitration claim is inappropriate.

The Fifth Circuit has set forth a number of lesser sanctions that a court is to consider before it dismisses with prejudice: "Assessments of fines, costs, or damages against the plaintiff or his counsel, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings are preliminary means or less severe sanctions that may be used to safeguard a court's undoubted right to control its docket." *Boudwin v.*

Graystone Ins. Co., 756 F.2d 399, 401 (5th Cir.1985). The court believes a monetary sanction is appropriate under the circumstances of this case. The court therefore orders Plaintiffs to pay all reasonable attorney's fees and costs incurred by the Defendant to amend its pretrial materials, to prepare for the pretrial conference, and to attend the pretrial conference on March 28, 2002.

III. Conclusion

For the reasons stated herein, the court grants Plaintiffs motion to compel arbitration and orders the parties to arbitrate this matter in accordance with the Texas General Arbitration Act and the provisions of the arbitration agreements.

It is further ordered, for the reasons previously stated, that Plaintiffs pay reasonable attorney's fees and costs as sanctions to the Defendant for its filing and preparation of pretrial materials as provided above. In the unlikely event a problem arises between the parties regarding the amount of sanctions to be awarded the Defendants, the parties may seek redress from the court.

Having determined all of the issues raised by the parties must be submitted to binding arbitration, and finding no other reason to retain jurisdiction over this matter, the court dismisses this case with prejudice. *See* Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir.1992).

N.D.Tex.,2002.
North River Ins. Co. v. Transamerica Occidental Life Ins. Co.
Not Reported in F.Supp.2d, 2002 WL 1315786 (N.D.Tex.)

END OF DOCUMENT

EX. 24
APP. 166 - 172

Briefs and Other Related Documents
Baum v. Avado Brands, Inc.N.D.Tex.,1999.Only the Westlaw citation is currently available.

United States District Court, N.D. Texas.
Jacob C. BAUM and Canyon (1997) Investment Limited Partnership, Plaintiffs.
v.
AVADO BRANDS, INC., f/k/a Apple South, Inc. and Erich J. Booth, Defendants.
No. Civ.A. 3:99-CV-0700G.

Nov. 12, 1999.

MEMORANDUM ORDER

FISH, J.

*1 Before the court are two motions-first, the motion of plaintiffs Jacob C. Baum and Canyon(1997) Investment Limited Partnership (collectively, "Baum") to remand this case to the state district court from which it was previously removed, and second, the motion of defendants Avado Brands, Inc. f/k/a Apple South, Inc. and Erich J. Booth ("Avado" and "Booth") to compel arbitration. For the reasons discussed below, the motion to remand is denied, and the motion to compel arbitration is granted.

I. *BAUM'S MOTION TO REMAND*

A. *Background*

On February 16, 1999, Baum filed suit against Avado and Booth in the 192nd Judicial District Court of Dallas County, Texas. Plaintiffs' Original Petition, attached as Exhibit 2 to Notice of Removal. In the suit, Baum alleges various causes of action against Avado and its chief financial officer, Booth, in connection with an Agreement and Plan of Merger ("Merger Agreement") that the parties entered into on June 19, 1997. Notice of Removal ¶ 2. Under the terms of this Merger Agreement. Avado acquired a Dallas-based restaurant chain from Baum upon payment of cash and more than 300,000 shares of stock. Plaintiffs' Motion to Remand Based on Untimely Removal and Supporting Brief ("Motion to Remand") ¶ 1. Generally, Baum claims that Avado has failed to honor its promises to provide him with protection regarding the price of stock that Avado issued to consummate its acquisition of Baum's restaurant group. *Id.* ¶ 2. Baum further contends that Avado made misrepresentations about the price protections it offered to induce him to enter into the Merger Agreement. *Id.* Baum's causes of action relating to the Merger Agreement include fraud in the inducement, securities fraud, and common law fraud. Plaintiffs' First Amended Original Petition, attached as Exhibit 5 to Notice of Removal ¶¶ 51-62.

Service of this lawsuit was effected on the Texas Secretary of State as agent for Booth on February 19, 1999, and as agent for Avado on February 23, 1999. *See* Exhibits E and F attached to Motion to Remand. The Secretary of State forwarded the citation, original petition, and the various discovery demands to both Avado and Booth on February 25, 1999. *See id.* Avado and Booth received these documents on March 1, 1999. *See id.* Avado and Booth filed an answer to the original petition in state court on March 22, 1999. Defendant's Original Answer to Plaintiffs' First Amended Original Petition, attached as Exhibit 8 to Notice of Removal.

On March 30, 1999, the defendants removed the action to this court on the basis of this court's federal question and diversity jurisdiction. *See* Notice of Removal. On April 9, 1999, Baum filed this motion to remand, urging that Avado's notice of removal was not timely filed. *See generally* Motion to Remand.

B. *Analysis*

"Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction." *Burks v. Amerada Hess Corporation*, 8 F.3d 301, 303 (5th Cir.1993), abrogated on other grounds, *Giles v. NYL Care Health Plans, Inc.*, 172 F.3d 332 (5th Cir.1999). When considering a motion to remand, the removing party bears the burden of showing that removal was proper. *Willy v. Coastal Corporation*, 855 F.2d 1160, 1164 (5th Cir.1988). "This extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute." *Albonetti v. GAF Corporation Chemical Group*, 520 F.Supp. 825, 827 (S.D.Tex.1981). With regard to the defendant's time limits for filing a notice of removal, "[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based ...". 28 U.S.C. § 1446(b).

*2 Baum argues that the notice of removal filed by Avado and Booth was untimely because it was filed more than thirty days after service was effected on them, no later than February 23, 1999, through valid service upon the Texas Secretary of State as Avado's designated statutory agent. Motion to Remand at 1. Baum reasons that since Booth and Avado were served on February 19, 1999, and February 23, 1999, respectively, through the Secretary of State of Texas, the time period for removal began to run against each of these defendants on those dates. *Id.* at 6.

Baum's contention is contrary to settled law, and the briefs in support of his motion seem to recognize this fact. While Baum correctly notes that the Fifth Circuit has yet to rule on this issue, he neglects to mention that every district court in Texas to consider the question has held that the thirty-day period begins to run when the defendant actually receives service, not when service is effected upon the Secretary of State. See, *e.g.*, *Monterey Mushrooms, Inc. v. Hall,* 14 F.Supp.2d 988, 991 (S.D.Tex.1998) ("When service is effected on a statutory agent, the removal period begins when the defendant actually receives the process, not when the statutory agent receives process."). This rule has been the same for over thirty years. See *Kurtz v. Harris,* 245 F.Supp. 752, 754 (S.D.Tex.1965) ("[R]eceipt by the statutory agent is not receipt by the defendant by any stretch of the judicial imagination." (quotation omitted).[FN1]

FN1. This same rule, that the thirty-day window commences when the defendant receives service, not when a statutory agent receives service, is applied consistently by district courts throughout the country. See, *e.g.*, *Wilbert v. UNUM Life Insurance Company,* 981 F.Supp. 61, 63 (D.R.I.1997) ("When a statutory agent is served, the clock for removal does not begin ticking as it would if defendant itself had been served but rather starts when defendant receives actual notice of the service from the statutory agent."); *Medina v. Wal-Mart Stores, Inc.,* 945 F.Supp. 519, 520 (W.D.N.Y.1996) ("[T]he heavy weight of authority is to the effect that the time for removal, in cases in which service is made on a statutory agent, runs from receipt of the pleading by the defendant rather than the statutory agent.") (citation omitted); *Cygielman v. Cunard Line Ltd.,* 890 F.Supp. 305, 307 (S.D.N.Y.1995) (collecting cases and finding that the rule which starts the removal clock only upon receipt of the petition by defendant "makes abundant sense, as the defendant's right to a federal forum ought not depend upon the rapidity and accuracy with which statutory agents inform their principals of the commencement of litigation against them"); *Skidaway Associates, Ltd. v. Glens Falls Insurance Company,* 738 F.Supp. 980, 982 (D.S.C.1990) ("The law appears to be settled that service on a statutory agent ... does not start the running of the removal statute time limitation period as would service on the defendant or an agent designated by the defendant."); *Weight v. Kawasaki Heavy Industries, Ltd.,* 597 F.Supp. 1082, 1084-85 (E.D.Va.1984) (rejecting plaintiff's argument that the time period for removal starts when service is made on the statutory agent and explaining that "[i]t is well settled that the time for seeking removal commences only when the defendant or an agent in fact receives the process.").

The only case cited by Baum in his motion to remand that addresses the present issue rejects the argument he makes here. *See* Motion to Remand at 9 (citing *Manuel v. Unum Life Insurance Company of America,* 932 F.Supp. 784, 784 (W.D.La.1996), and recognizing the court's holding that the "thirty day period in which defendant can remove commences on defendant's actual receipt of a copy of the pleading."). In his reply brief, Baum cites one case in support of his position. *See* Plaintiffs' Reply Brief in Support of Motion to Remand ("Reply Brief") at 4 (citing *Bodden v. Union Oil Company of California & Life Insurance Company of North America,* No. CIV. A. 97-3372, 1998 WL 88048, at *2 (E.D. La., Feb. 20, 1998) (holding that "... the thirty-day period set forth in Section 1446(b) commences when service of process is made on the Secretary of State ...".)). This case has been described by a judge of this court as "contrary to the great weight of authority ." *Fidelity Funding, Inc. v. Pollution Research & Control Corporation,* No. Civ. A. 3:98-CV-1691-P, 1999 WL 20955 at *2 (N.D.Tex. Jan. 7, 1999) (Solis, J.). With almost no case law on his side, Baum is reduced to claiming that "[t]he few cases and commentators holding that 'actual receipt' is required to begin the removal timetable have generally provided little explanation for this viewpoint." FN2 Motion to Remand at 8.

FN2. Baum also argues that the Supreme Court's recent decision in Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 119 S.Ct. 1322 (1999), supports his position. *See* Reply Brief at 1-5. He implies that *Murphy Brothers* overruled the legion of cases cited here that have rejected his arguments. Reply Brief at 2-6. This is not so by any stretch of the imagination. The question in *Murphy Brothers* was whether receipt of a " 'courtesy copy' of a filed complaint faxed by counsel for the plaintiff" started the removal clock running, or "whether the named defendant must be officially summoned to appear in the action." Murphy Brothers, 119 S.Ct. at 1325. In reversing the Eleventh Circuit, the Court held that the time to remove does not begin to run "by mere receipt of the complaint unattended by any formal service." *Id.* The plaintiff in *Murphy Brothers* argued for a rule requiring a party to act *before* it was formally made a party to the litigation by service of process. *Id.* at 1326-27. Here, the question is whether the removal clock starts to run sometime *after* substituted service of process on a statutory agent. The Supreme Court never discussed any of the cases cited here by either party and never mentioned substituted service of process on a statutory agent.
As an aside, it should be noted that the decision in *Murphy Brothers* abrogates the holding in Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 841 (5th Cir.1996) (holding that the removal period begins with receipt of a copy of the initial pleading through any means, not just service of process). See Murphy Brothers, 119 S.Ct. at 1326 n. 2. The *Bodden* court, Baum's only supporting case, explicitly relied on *Reece* in its ruling. See *Bodden*, 1998 WL 88048, at *2- *3.

The court is unpersuaded. There is considerably more explanation for this viewpoint than there is for Baum's. In keeping with the great weight of authority on this issue, the court concludes that the thirty-day window commenced when Avado and Booth received service, not when their statutory agent received service. Accordingly, Avado's notice of removal was timely filed, and Baum's motion to remand must be denied.FN3

FN3. Avado also seeks an award of costs and fees on the motion. Although the court has rejected Baum's position as to when the removal clock starts running, the matter is admittedly not free from doubt, and Baum's argument-while the court found it unpersuasive-is not frivolous. Accordingly, Avado's motion for costs and fees on the motion to remand is denied.

II. *AVADO'S MOTION TO COMPEL ARBITRATION*

A. *Background*

*3 Baum alleges various causes of action against Avado and Booth in connection with a Merger Agreement entered into by the parties on June 19, 1997 and a Registration Rights Agreement dated July 17, 1997. Section 12.10 of the Merger Agreement, entitled "Settlement of Disputes," provides:
(a) *Arbitration.* All disputes and controversies of every kind and nature between the parties hereto arising out of or in connection with this Agreement as to the construction, validity, interpretation or meaning, performance, non-performance, enforcement, operation, or breach, shall be submitted to arbitration pursuant to the following procedures:
(i) After a dispute or controversy arises, either party may, in a written notice delivered to the other party, demand such arbitration. Such notice shall designate the name of the arbitrator appointed by such party demanding arbitration, together with a statement of the matter in controversy;
(ii) Within 30 days after receipt of such demand, the other party shall, in a written notice delivered to the other party, name such party's arbitrator. If such party fails to name an arbitrator, then the second arbitrator shall be named by the American Arbitration Association ("AAA"). The two arbitrators so selected shall name a third arbitrator within 30 days, or in lieu of such agreement on a third arbitrator by the two arbitrators so appointed, the third arbitrator shall be appointed by the AAA;
(iii) The arbitration hearing shall be held in Dallas, Texas (in the case of arbitration initiated by Apple South or the Surviving Corporation) or in Atlanta, Georgia (in the case of arbitration initiated by the Company prior to the Merger or by a Stockholder) at a location designated by a majority of the arbitrators.

The Commercial Arbitration Rule of the AAA shall be used and the substantive laws of the State of Delaware (excluding conflict of laws provisions) shall apply;
(iv) The arbitration hearing shall be conducted within ten (10) days unless otherwise ordered by the arbitrators and the award thereon shall be made within fifteen (15) days after the close of submission of evidence. An award rendered by a majority of the arbitrators appointed pursuant to this Agreement shall be final and binding on all parties to the proceeding, shall deal with the question of costs of the arbitration and all related matters, and judgment on such award may be entered by either party in a court of competent jurisdiction; and
(v) Except as set forth in Paragraph 12.10(b), the parties stipulate that the provisions of this Paragraph 12.10 shall be a complete defense to any suit, action or proceeding instituted in any federal, state, or local court or before any administrative tribunal with respect to any controversy or dispute arising out of this Agreement. The arbitration provisions hereof shall, with respect to such controversy or dispute, survive the termination or expiration of this Agreement.

(b) *Emergency Relief.* Notwithstanding anything in this Paragraph 12.10 to the contrary, either party may seek from a court any provisional remedy that may be necessary to protect any rights or property of such party pending the establishment of the arbitral tribunal or its determination of the merits of the controversy.
*4 (i) *Jurisdiction.* In connection only with the provisions of this Paragraph 12.10(b), each party hereto irrevocably submits to the exclusive jurisdiction of the United States District Court for the Northern District of Texas or the Middle District of Georgia, and if such court does not have jurisdiction, of the courts of Dallas County in the State of Texas and the courts of Morgan County in the State of Georgia, for the purposes of any action arising out of this Agreement, or the subject matter hereof or thereof, brought by any other party under Paragraph 12.10 of this Agreement.

Merger Agreement, located at A-1 of Motion to Compel Arbitration and Stay Proceedings and Brief in Support Thereof ("Motion to Compel").

Section 4.9 of the Registration Rights Agreement, entitled "Dispute Resolution," provides:
This Agreement is subject to the arbitration provisions contained in Section 12.10 of the Merger Agreement, which are hereby incorporated herein by reference.

Registration Rights Agreement, located at A-2 of Motion to Compel.

B. *Analysis*

1. *Baum's Claims Against Avado*

Both federal and applicable state law strongly favor arbitration. Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 24-25 (1983); Cantella & Company, Inc. v. Goodwin, 924 S.W.2d 943, 944 (Tex.1996). In fact, the Supreme Court recently reemphasized that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, "declared a national policy favoring arbitration." Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 56 (1995) (quoting Southland Corporation v. Keating, 465 U.S. 1, 10 (1984)). The Supreme Court has also explained that the FAA was enacted "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 474 (1989) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985)).

Whether a contract's arbitration clause requires arbitration of a given dispute is a matter of contract interpretation, Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649, 651 (5th Cir.1979), which is to be performed by the court. AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649 (1986) (it is court's duty to interpret agreement and determine whether parties intended to arbitrate). The court's interpretive function must be carried out with appropriate deference to the strong federal policy that favors arbitration over litigation and requires that arbitration clauses be construed generously, in favor of arbitration. *See* Southland, 465 U.S. at 10-11. However, notwithstanding judicial deference to arbitration, a party may not be required to arbitrate a dispute that it did not agree to arbitrate, Commercial Metals Company v. Balfour, Guthrie, and Company, Ltd., 577 F.2d 264, 266 (5th Cir.1978), and the controversy must come within the contract's arbitration provision before the court can order arbitration. Explo, Inc. v. Southern Natural Gas Co., 788 F.2d 1096, 1098 (5th Cir.1986).

*5 In this case, the issue of arbitrability is governed by the Merger Agreement and the Registration Rights Agreement. Both of these agreements were entered into as part of a heavily negotiated business transaction in which the parties were represented by counsel. *See* Motion to Compel at 5. Baum has asserted the following claims arising out of or in connection with the Merger Agreement: (i) fraud in the inducement, (ii) securities fraud, (iii) common law fraud, (iv) negligent misrepresentation, (v) promissory estoppel, (vi) breach of contract, (vii) specific performance, (viii) violations of the Lanham Act, (ix) infringement of the common law right of publicity, (x) infringement of the common law right of privacy, (xi) exemplary damages, and (xii) injunctive relief. Plaintiffs' First Amended Petition ¶ ¶ 51-104, attached as Exhibit 5 to Notice of Removal. Each of the above counts clearly, in the language of the merger agreement, "aris[es] out of or in connection with th[ese] Agreement[s] as to the construction, validity, interpretation or meaning, performance, non-performance, enforcement, operation, or breach [thereof]." Merger Agreement, 12.10(a).FN4

FN4. Baum argues that his Lanham Act claims and common law claims against Avado that arise out of Avado's alleged unauthorized use of Baum's picture in certain of its promotional materials are not based on, and do not arise out of, the terms of the Merger Agreement. Plaintiffs' Response and Brief Opposing Defendants' Motion to Compel Arbitration and Stay Proceedings ("Response") at 9. Keeping in mind the Supreme Court's pronouncement "that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25, this court concludes that all of Baum's claims are arbitrable because they "touch matters covered by the" arbitration provisions. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n. 13 (1985). See also *Snap-on Tools Corporation v. Mason*, 18 F.3d 1261, 1265 (5th Cir.1994) ("[b]ecause the tort claims arise out of the business relationship between the opposing parties, it appears that they are arbitrable under the terms of the agreement.").

Under the express terms of the Agreements, all of the claims in this dispute are subject to mandatory arbitration unless Avado has waived its right to arbitrate its claims. Baum does indeed argue that Avado has waived its right to seek arbitration of its claims by substantially invoking the litigation process to Baum's detriment. Plaintiffs' Response and Brief Opposing Defendant's Motion to Compel Arbitration and Stay Proceedings ("Response") at 5-8. Baum argues that Avado never requested or even suggested that the parties should arbitrate Baum's claims in the months of "fruitless negotiations" that led to Baum's filing this lawsuit on February 19, 1999. *Id.* at 6. Baum also claims that Avado and Booth have been active participants in this litigation because they have: (i) filed an answer, notice of removal, response to Baum's remand motion, and initial disclosures; (ii) conferred with Baum regarding discovery and other issues in this litigation; (iii) participated in the filing of a Joint Status Report and (iv) produced some documents and other information in discovery. *Id.* at 7.

The Fifth Circuit recently summarized its jurisprudence regarding whether a party has waived its right to pursue contractual arbitration:

"Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." *Miller Brewing Company v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 (5th Cir.1986).

There is a strong presumption against waiver of arbitration. See, *e.g.*, *Lawrence v. Comprehensive Business Services Co.*, 833 F.2d 1159, 1164 (5th Cir.1987) ("Waiver of arbitration is not a favored finding and there is a presumption against it."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 ("[A]s a matter of law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Accordingly, a party alleging waiver of arbitration must carry a heavy burden. *Associated Builders v. Ratcliff Constr. Co.*, 823 F .2d 904, 905 (5th Cir.1987).

*6 *Subway Equipment Leasing Corporation v. Forte*, 169 F.3d 324, 326 (5th Cir.1999).

Baum spends a substantial amount of time discussing Avado's failure to seek arbitration before Baum filed this suit. Response at 2-8. The Fifth Circuit has already rejected the argument, like the one made here by Baum, that a defendant's failure to demand arbitration before the plaintiff filed suit somehow waived the defendant's right to arbitration. In *General*

Guaranty Insurance Company v. New Orleans General Agency, 427 F.2d 924, 928 (5th Cir.1970), the court explained that "[r]equiring pre-suit demand will place on the party sought to be charged the duty to institute proceedings which may establish his own liability, though if he remains inactive the claims asserted against him may never be formally pressed in either arbitration or court proceedings (and in some instances may be wholly without merit)." Avado's pre-suit conduct thus cannot be construed as a waiver of its contractual right to arbitrate.

Nor is this court convinced that Avado's post-suit conduct has waived its right to arbitrate. Since Baum instituted this action, Avado has done little to "invoke the judicial process." Avado has participated in a court-ordered joint status report and served its mandatory disclosures under Rule 26(a). It has also removed this action and filed a response to Baum's Motion to Remand. Fifth Circuit case law, discussed below, clearly establishes that Avado's actions did not "substantially invoke the judicial process."

In Walker v. J.C. Bradford & Company, 938 F.2d 575 (5th Cir.1991), the Fifth Circuit reversed the district court's refusal to stay proceedings and compel arbitration when dealing with facts more favorable to the plaintiffs than those here. *Id.* at 576. In that case, the defendant removed the case to federal court, served the plaintiffs with interrogatories and requested production of documents, attended a pretrial conference, and waited thirteen months before seeking to compel arbitration. *Id.* The Fifth Circuit nevertheless held that the district court's finding that the defendant had waived its right to arbitrate was clearly erroneous, explaining that "although [defendant] may act late, it acts in time, for its actions in federal court were not so substantial as to mandate that we overcome the legal presumption that parties who contracted for arbitration should be allowed to arbitrate." *Id.* at 578; also Subway, 169 F.3d at 326 ("*Walker* provides an example of this court's hesitation to find that a party has waived its contractual right to arbitration.") (quotation and bracket omitted).

In Williams v. CIGNA Financial Advisors, Inc., 56 F.3d 656 (5th Cir.1995), the Fifth Circuit vacated the district court's refusal to compel arbitration upon a finding that the defendant did not waive its contractual right to arbitrate by removing the case to federal court and filing a motion to dismiss before seeking, five months after plaintiff filed suit, to require arbitration of the plaintiff's claims. *Id.* at 658; also Tenneco Resins, Inc. v. Davy International, AG, 770 F.2d 416, 420-21 (5th Cir.1985) ("While it is true that Davy waited almost eight months before moving that the district court proceedings be stayed pending arbitration, and, in the meantime, participated in discovery, this and other courts have allowed such action as well as considerably more activity without finding that a party has waived a contractual right to arbitrate."). Avado's activity in this litigation falls well within the bounds of conduct established by these cases, and this court accordingly finds that Avado has not waived its right to seek arbitration with regard to Baum's causes of action (i) through (xii).

2. *Baum's Claims Against Booth*

*7 Baum states some claims against Avado, while other claims are brought against both Avado and Booth. First Amended Petition ¶¶ 51-101. There are no claims stated solely against Booth. *Id.* As with the claims brought solely against Avado, all of the claims brought jointly against Avado and Booth relate to acts and omissions in connection with the parties' relationship arising out of the Merger Agreement and the Registration Rights Agreement. As Baum's First Amended Petition discloses, Booth is both Avado's chief financial officer and its corporate treasurer. First Amended Petition ¶ 6. Baum's allegations against Booth relate only to alleged acts and omissions undertaken in his capacity as a corporate agent of Avado.

While the Fifth Circuit has yet to address this issue, other circuit court decisions establish that an agent is entitled, pursuant to an arbitration agreement between his principal and the plaintiff, to compel arbitration of the plaintiff's claims against the agent for acts taken in his or her representative capacity. For example, in Arnold v. Arnold Corporation-Printed Communications for Business, 920 F.2d 1269, 1281 (6th Cir.1990), the Sixth Circuit rejected the plaintiff's claim that it could not be forced to arbitrate its claims against the defendant officers and directors of the defendant corporation because they were not signatories to the agreement containing the arbitration clause. The court explained: "if [plaintiff] 'can avoid the practical consequences of an agreement to arbitrate by naming nonsignatory parties as [defendants] in his complaint, ... the effect of the rule requiring arbitration would, in effect, be nullified." *Id.* (quoting the district court's opinion) (second bracket in original). Accordingly, the court held that where the "alleged wrongful acts relate to the nonsignatory defendants' behavior as officers and directors or in their capacities as agents;" the nonsignatory agents could compel arbitration of the plaintiff's claims. *Id.* at 1282; also *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185, 1187 (9th Cir.1986) ("Other circuits have held consistently that nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles."); *Pritzker v. Merrill Lynch, Picra, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3rd Cir.1993) (endorsing the opinions in *Arnold* and *Letizia* and concluding that "[b]ecause a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements."); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993) ("Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement."); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir.1993), *cert. denied*, 513 U.S. 869 (1994) (holding that claims against a nonsignatory were subject to an arbitration provision so long as the nature of the underlying claims fell within the scope of the arbitration clause); *Hughes Masonry Co., Inc. v. Greater Clark City School Building Corp.*, 659 F.2d 836, 838-41 (7th Cir.1981) (holding that the plaintiff was equitably estopped from repudiating the arbitration agreement where its claims against a nonsignatory complained of breaches of duties and responsibilities arising out of the same contract containing the arbitration agreement).

***8** For these same reasons, Baum's claims against Booth are subject to arbitration. The only claims Baum brings against Booth are identical to claims brought against Avado. Moreover, these claims all arise out of alleged conduct Booth undertook in his capacity as an agent for Avado in connection with the Merger Agreement and the Registration Rights Agreement. Accordingly, in agreement with the well-settled case law, Baum's claims against Booth, like his claims against Avado, are subject to arbitration.

III. *CONCLUSION*

For the above reasons, Baum's motion to remand is DENIED, and Avado's motion to compel arbitration and stay proceedings is GRANTED.

Within thirty days of this date, Avado shall serve on Baum and the court a written demand for arbitration, in conformity with the Agreements at issue in this case. Pending further order of this court, all proceedings in this case are STAYED.

SO ORDERED.

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Not Reported in F.Supp.2d, 1999 WL 1034757 (N.D.Tex.)

Briefs and Other Related Documents (Back to top)

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